SUPREME COURT, U.S.
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No. 09-1412

IN THE

Supreme Court of the United States

PARAGUAY HUMANITARIAN FOUNDATION, INC.,
FKA CQZ HUMANITARIAN FOUNDATION, INC., *ET AL.*,

Petitioners,

v.

BANCO CENTRAL DEL PARAGUAY, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners – defendants below – filed a third-party complaint against two banks located in Paraguay. They never served the third-party complaint on the banks. Did the district court abuse its discretion in dismissing the third-party complaint without prejudice, pursuant to Fed. R. Civ. P. 12(b)(5) and 4(m), where (1) Petitioners took no steps to attempt to serve the third-party complaint in Paraguay for two and a half years after filing it, and (2) Petitioners never effected service and never explained why they could not?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondents state that none of them has a parent corporation and no publicly held corporation owns ten percent or more of their stock.

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Respondents submit this opposition to the petition for a writ of certiorari.

STATEMENT

1. Working with the liquidators of two Paraguayan banks and others in Paraguay (some of whom have now been criminally convicted), Petitioners converted $16 million of the banks' funds using purported "agreements" with the banks and other documents – including forged "guarantees" and fraudulent checks that in the words of the district judge "bounce[d] as high as a Baltimore chop." (*See* Pet. 34a; JA-134-38; JA-175-77; *see also* JA-214; JA-220-21; JA-237-38; JA-295-96.) The money had been illegally transferred out of Paraguay to Petitioners' accounts as part of a scheme involving false "high yield" investment plans and non-existent "humanitarian" infrastructure projects supposedly sponsored by the U.S. Government. (*See* JA-152; JA-167; *see also* JA-143-47; JA-201-02; JA-206-07.) As Petitioners later admitted and U.S. Government officials confirmed, the project financing programs claimed by Petitioners never existed. (*See* JA-186; JA-209-10; JA-270-74; JA-300; JA-544-45.)

2. On September 1, 2001, Respondent Banco Central del Paraguay ("Central Bank"), pursuant to its legal authority as supervisor of failed banks, obtained an assignment from the two Paraguayan banks in liquidation of all their rights and claims relating to the diverted funds. (JA-263; JA-265-68.) On November 1, 2001, the Central

Bank, in its capacity as the banks' assignee, commenced this action against Petitioners to recover the funds. (JA-1.) In response, Petitioners filed an answer, a counterclaim against the Central Bank, and a third-party complaint against the Paraguayan banks in liquidation, alleging breach of contract and tortious interference, and seeking compensatory damages as well as "a humongous and bodacious amount of punitive damages." (JA-98; Pet. 20a.)

3. On January 7, 2005, the district court granted the Central Bank's motion for summary judgment, finding that Petitioners' arguments had no "evidentiary support whatsoever," and that Petitioners had converted the $16 million as a matter of law because the Central Bank indisputably had a superior right to the funds and Petitioners indisputably had failed to return them. (Pet. 38a-43a.) The court of appeals affirmed, similarly holding that "the sixteen million dollars...was unlawfully transferred out of Paraguay." (Pet. 5a.)

On October 31, 2005, the district court dismissed the counterclaim with prejudice on legal grounds. The court also dismissed without prejudice Petitioners' third-party complaint. The district court found that Petitioners' failure to serve the banks in Paraguay was a defect in service under Fed. R. Civ. P. 12(b)(5), and that Petitioners had "not shown good cause for the fail[u]re of service, *see* Fed. R. Civ. P. 4(m)." (Pet. 27a.) The court of appeals affirmed, holding that the district court had not "abused its discretion here where defendants waited two and a

half years to attempt service, never effected service, and did not explain why they had not been able to effect service." (Pet. 7a.)

REASONS WHY THE PETITION SHOULD BE DENIED

1. Petitioners' "question presented" misstates the real question in this case. The issue here is not, as Petitioners portray it, whether Rule 4(m) authorizes dismissal "if a litigant attempts service in a foreign country after 120 days." The real question presented is whether it is within the sound discretion of a district court to dismiss a third-party complaint *without prejudice* where: Petitioners did not even *attempt* to serve the third-party complaint in Paraguay for two and a half years after filing it, and never explained why; Petitioners then purportedly "sent" the third-party complaint "to Paraguay for service" (Pet. 25a), but did not explain what steps they took to try to effect service; and Petitioners never effected service and never explained why.

2. The decision below is consistent with the case law throughout the circuits. Petitioners' assertion of a "deep and broad" split of authority regarding the foreign country exception in Rule 4(m) (Pet. 10) vastly overstates any differences in the cases. To the contrary, there is universal agreement among the courts of appeals that have considered the issue that the requirement of service within 120 days after filing under Rule 4(m) does *not* apply to service

in a foreign country. The courts of appeals that have addressed the issue also agree, however, that there must be *some* time limit for service in foreign countries, particularly where a plaintiff cannot show any effort to effect service within a reasonable period. *See, e.g.*, *USHA (India), Ltd. v. Honeywell Int'l, Inc.*, 421 F.3d 129, 134 (2d Cir. 2005) (dismissing under Rule 4(m) where "plaintiff did not attempt to serve the defendant in the foreign country"); *Nylok Corp. v. Fastener World Inc.*, 396 F.3d 805, 807 (7th Cir. 2005) ("the amount of time allowed for foreign service is not unlimited").

Petitioners' contention that the Ninth Circuit conflicts with the Second Circuit is simply wrong. Petitioners assert that in *Lucas v. Natoli*, 936 F.2d 432 (9th Cir. 1991), the Ninth Circuit rejected a supposed rule in the Second Circuit that service in a foreign country must have been attempted within 120 days. (Pet. 12-13.) Petitioners mis read both *Lucas* and the Second Circuit decisions. As the Ninth Circuit recognized, the Second Circuit's decision in *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737 (2d Cir. 1985), did not turn on whether service in a foreign country was attempted within 120 days, but rather held that dismissal was appropriate "because no service had been effected anywhere at the time of the order of dismissal." *Lucas*, 936 F.2d at 433. Thus, as *Lucas* understood, "the question whether the 120-day requirement of Rule 4([m]) applies to service in a foreign country was irrelevant" to the holding in *Montalbano*. *Id.* at

433; *see also Montalbano*, 766 F.2d at 740. Likewise, the Second Circuit's decision below does not turn on Petitioners' failure to attempt service within 120 days, but on their failure to do so in two and a half years and the other circumstances described above.

Petitioners claim that a handful of district courts have interpreted *Lucas* as finding that there is no time limit on service in a foreign country. But *Lucas* at best is silent on the question whether a district court has discretion to dismiss if a plaintiff does not attempt to serve in a foreign country within some reasonable time beyond 120 days – and likely implies that it does. *See, e.g.*, *Baja Developments LLC v. TSD Loreto Partners*, No. 09-cv-756, 2009 WL 2762050, at *1 (D. Ariz. Aug. 28, 2009) (citing *Lucas* as controlling and stating "Plaintiff has not cited, nor has the Court found, any authority stating that a district court is precluded from setting a reasonable time limit for service in a foreign country to properly manage a civil case."). Ten of the eleven district court cases Petitioners cite on this point are to the same effect. (Pet. 15 n.8.)[1]

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[1] Only *Pa. Orthopedic Ass'n v. Mercedes-Benz A.G.*, 160 F.R.D. 58, 60-61 (E.D. Pa. 1995), actually holds, based on that court's interpretation of *Lucas*, that plaintiffs have an unlimited amount of time for foreign service.

The district courts virtually universally acknowledge discretion to dismiss in appropriate circumstances and in fact employ a single standard that considers the totality of the circumstances specific to the case to determine "the reasonableness and diligence of plaintiff's efforts to serve." *See In re Crysen/Montenay Energy Co.*, 166 B.R. 546, 553 (S.D.N.Y. 1994); *see also, e.g.*, *Nabulsi v. Nahyan*, No. H-06-cv-2683, 2008 WL 1924235, at *5-*6 (S.D. Tex. Apr. 29, 2008); *Teta v. Li*, No. 02-cv-2183, 2005 WL 1668093, at *3-*4 (D. Conn. July 15, 2005). Indeed, this is the same test that the district courts generally used to determine whether dismissal for failure to effect timely service was appropriate when Rule 4 was silent as to the timing of service, *i.e.*, before Congress amended Rule 4 in 1983 to impose the 120-day time limit on domestic service. *See Montalbano*, 766 F.2d at 740 n.6 ("before 1983 there was no set time limit for summons service after the filing of the complaint; instead, a kind of due diligence standard was flexibly applied") (citing Siegel, Practice Commentaries U.S.C.A. Rule 4, at 54 (West Supp. 1985)). Although Rule 4 now has an express timing rule for domestic service, the Rule remains silent as to the timing of foreign service, and there is no reason to believe that the pre-existing test no longer applies to foreign service.

3. Petitioners suggest that dismissal under Rule 41(b) is the only available remedy for district courts seeking to "move a case along" for failure to effect foreign service. (Pet. 20.) But district courts

generally apply the same flexible due diligence standard under Rule 41(b) as they do under Rules 12(b)(5) and 4(m). *See, e.g., In re Southold Development Corp.*, 148 B.R. 726, 730 (E.D.N.Y. 1992) (applying "flexible due diligence" standard under Rule 41(b) where plaintiff attempted service in a foreign country but had not effected service after eleven months). The principal difference is that dismissal under Rule 41(b) is *with prejudice* unless the court affirmatively orders otherwise.

4. The petition acknowledges that the vast majority of dismissals without prejudice for failure of service are inconsequential because they are "remedied most easily simply by re-filing the complaint." (Pet. 16.) And, in most cases, plaintiffs do simply re-file and then act more diligently to effect service. (*Id.*) This purported issue, in other words, affects a tiny fraction of cases – the cases where plaintiffs have failed for such a lengthy period to act diligently to attempt service in a foreign country that a legal impediment precludes re-filing. Protecting those few parties from their own lack of diligence is not an important issue that requires this Court's attention.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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